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VIA E-MAIL ([tveazey@mtsla.org](mailto:tveazey@mtsla.org))  
Tara Veazey  
Chair, Montana Public Defender Commission  
616 Helena Avenue, Suite 100  
Helena, MT 59601

Re: Montana Public Defender Commission  
Our File: PDC-01

Dear Tara:

You will recall that I submitted a Memorandum dated April 15, 2008 to the Commission, Randi Hood, and OPD Attorneys and Staff. To my recollection, you were the only one who expressed any concern regarding the issues I raised in the Memorandum. Regardless, there is one issue that I believe requires the immediate attention of the Commission and OPD.

This issue relates to the Third ABA Principle and is set forth in the Memorandum as follows:

**3. Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.**

Commentary: "Counsel should be furnished upon arrest, detention, or request, and usually within 24 hours thereafter."

My Evaluation: By statute, the PDC is to "establish protocols to ensure that the office makes appropriate assignments in a timely manner." § 47-1-104(3), MCA. The PDC has adopted standards relating to the early entry of lawyers into cases. *See*, Standards at ¶ III2A ("Effective representation should be available to an eligible person upon request.....as soon as the person is under investigation, [or is] arrested, [or] charged."). Certainly, early entry is critical. Had not Al Avignone been assigned by the Bozeman Public Defender to represent John Lebrum shortly after arrest and had not Al immediately gone to the jail to meet with Lebrum, the result of the case would likely have been much less favorable to Lebrum.

The Standards also require representation prior to, and at, the initial appearance. *See*, Standards at ¶ III2B (The defendant "shall be entitled to consult with a public defender for not less than 15 minutes prior to his or her first court appearance."). To the best of my knowledge, potential PD clients in Cascade County are not being provided with counsel at the initial felony appearance. If so, this practice should be changed, in part, because, "[i]f feasible, counsel should offer representation for the initial appearances for the purpose of making a bond argument." *Id.* I know from experience in Cascade County that the district judges will reduce bail if the defendant

is represented by counsel at the initial appearance. Perhaps procedures could be in place whereby a paralegal or financial eligibility tech could go to the jail first thing every morning to interview all new arrestees prior to the initial appearance. If a client is released on his or her own recognizance or is able to bond out at a lower bail after the initial appearance, the jails will be less crowded and the local authorities will save money on confining prisoners. Also, by saving money which would have otherwise been used for bail, the client and the client's family may have sufficient funds to retain private counsel and thus lighten the OPD caseload.

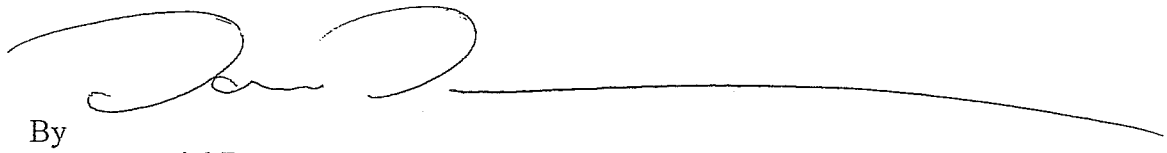
Legal representation in connection with the initial appearance is not merely a standard to strive for but is required by Federal constitutional law. In *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008), the issue was whether the accused's right to counsel attached at the initial appearance. The Supreme Court "reaffirm[ed] what we have held before and what an overwhelming majority of American jurisdictions understand in practice: a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *Id.* at 2592; *see also* 2581 (The 6<sup>th</sup> Amendment right to counsel "applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty. [citations omitted].").

One could contend, based on the concurring opinions in *Rothgery*, that it is constitutionally permissible for counsel to be appointed "within a reasonable time" after the initial appearance. *See also*, MCA 46-8-101("without unnecessary delay"). However, the *Rothgery* majority re-observes that "in most States, at least with serious offenses, free counsel is made available at [the first formal proceeding against the accused]." *Id.* at 2586 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 180-181(1991)). From my observation of felony initial appearances in Cascade County, bail is set by the court based on written input from the Cascade County Attorney with no input from defense counsel because, ordinarily, the accused has no representation and defense counsel is not present. In my opinion, this is a critical stage of the proceedings where the State is, in effect, being represented by counsel and the defendant is not being represented by counsel. Particularly because the adopted and approved PDC standard requires that the accused "shall be entitled to consult with a public defender for not less than 15 minutes prior to his or her first court appearance," it is not acceptable for our Montana criminal justice system, here in Cascade County or elsewhere, to assign counsel after the initial appearance.

I realize that it costs more for OPD to provide effective assistance of counsel, i.e., counsel who have interviewed the accused prior to court and who have gained some familiarity with the case, at initial appearances. But nothing less is required and, I am told, this procedure is in effect in Gallatin County. Furthermore, as stated in the Memorandum, the Montana criminal justice system, overall, will save money in the long run as well. More importantly, the goal of equal justice for all is more likely to be achieved if the accused in Montana is represented by counsel at initial appearances.

Very truly yours,

THOMPSON, POTTS & DONOVAN, P.C.

A large, stylized handwritten signature in dark ink, appearing to read 'Dan Donovan', is written over a horizontal line.

By

Daniel Donovan  
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